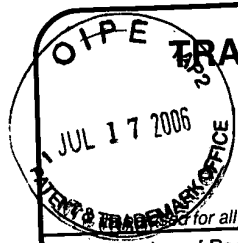


07-18-06

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# TRANSMITTAL FORM

Application Number	10/673,296
Filing Date	September 29, 2003
First Named Inventor	Michael Mittelstein, et al.
Art Unit	3746
Examiner Name	Emmanuel Sayoc
Attorney Docket Number	P03115 (6639-000035/US)

Total Number of Pages in This Submission 10

## ENCLOSURES (check all that apply)

<input checked="" type="checkbox"/> Fee Transmittal Form <input checked="" type="checkbox"/> Fee Attached <input type="checkbox"/> Amendment / Reply <input type="checkbox"/> After Final <input type="checkbox"/> Affidavits/declaration(s) <input type="checkbox"/> Extension of Time Request <input type="checkbox"/> Express Abandonment Request <input type="checkbox"/> Information Disclosure Statement <input type="checkbox"/> Certified Copy of Priority Document(s) <input type="checkbox"/> Reply to Missing Parts/ Incomplete Application <input type="checkbox"/> Reply to Missing Parts under 37 CFR 1.52 or 1.53	<input type="checkbox"/> Drawing(s) <input type="checkbox"/> Licensing-related Papers <input type="checkbox"/> Petition <input type="checkbox"/> Petition to Convert to a Provisional Application <input type="checkbox"/> Power of Attorney, Revocation Change of Correspondence Address <input type="checkbox"/> Terminal Disclaimer <input type="checkbox"/> Request for Refund <input type="checkbox"/> CD, Number of CD(s) _____ <input type="checkbox"/> Landscape Table on CD	<input type="checkbox"/> After Allowance Communication to TC <input type="checkbox"/> Appeal Communication to Board of Appeals and Interferences <input checked="" type="checkbox"/> Appeal Communication to TC (Appeal Notice, Brief, Reply Brief) <input type="checkbox"/> Proprietary Information <input type="checkbox"/> Status Letter <input checked="" type="checkbox"/> Other Enclosure(s) (please identify below): Check in the amount of \$500.00 Postcard
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Remarks

The Commissioner is hereby authorized to charge any additional fees that may be required under 37 CFR 1.16 or 1.17 to Deposit Account No. 08-0750.

## SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT

Firm	Haress, Dickey & Pierce, P.L.C.		
Signature			
Printed Name	Michael L. Smith		
Date	July 17, 2006	Reg. No.	35,685

## CERTIFICATE OF TRANSMISSION/MAILING

I hereby certify that this correspondence is being facsimile transmitted to the USPTO or deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on the date shown below.

Typed or printed name	Michael L. Smith	Express Mail Label No.	EV 639016538 US
Signature		Date	July 17, 2006

This collection of information is required by 37 CFR 1.5. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11 and 1.14. This collection is estimated to 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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**FEE TRANSMITTAL  
for FY 2006**

Effective 9/2/8/2006. Patent fees are subject to annual revision.

☐ Applicant claims small entity status. See 37 CFR 1.27**TOTAL AMOUNT OF PAYMENT** (\$) 500**Complete if Known**

Application Number	10/673,296
Filing Date	September 29, 2003
First Named Inventor	Michael Mittelstein, et al.
Examiner Name	Emmanuel Sayoc
Art Unit	3746
Attorney Docket No.	P03115 (6639-000035/US)

**METHOD OF PAYMENT (check all that apply)**☒ Check ☐ Credit card ☐ Money ☐ Other ☐ None  
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Number

08-0750

Deposit  
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Name

Harness, Dickey &amp; Pierce, PLC

**The Director is authorized to: (check all that apply)**
☐ Charge fee(s) indicated below ☒ Credit any overpayments  
☒ Charge any additional fee(s) during the pendency of this application  
☐ Charge fee(s) indicated below, except for the filing fee  
 to the above-identified deposit account.
**FEE CALCULATION****1. BASIC FILING FEE**

Large Entity		Small Entity		Fee Description	Fee Paid
Fee Code	Fee (\$)	Fee Code	Fee (\$)		
1011	300	2011	150	Utility filing fee	
1012	200	2012	100	Design filing fee	
1013	200	2013	100	Plant filing fee	
1014	300	2014	150	Reissue filing fee	
1005	200	2005	100	Provisional filing fee	

**SUBTOTAL (1)**

(\$) 0

**2. EXTRA CLAIM FEES FOR UTILITY AND REISSUE**

	Total Claims	Independent Claims	Multiple Dependent	Extra Claims	Fee from below	Fee Paid
	-20 **			0	X	0
		-3 **		0	X	0
						0

Large Entity		Small Entity		Fee Description
Fee Code	Fee (\$)	Fee Code	Fee (\$)	
1202	50	2202	25	Claims in excess of 20
1201	200	2201	100	Independent claims in excess of 3
1203	360	2203	180	Multiple dependent claim, if not paid
1204	200	2204	100	** Reissue independent claims over original patent
1205	50	2205	25	** Reissue claims in excess of 20 and over original patent

**SUBTOTAL (2)**

(\$) 0

\*\*or number previously paid, if greater; For Reissues, see above

**FEE CALCULATION (continued)****3. ADDITIONAL FEES**

Large Entity Small Entity

Fee Code	Fee (\$)	Fee Code	Fee (\$)	Fee Description	Fee Paid
1051	130	2051	65	Surcharge - late filing fee or oath	
1052	50	2052	25	Surcharge - late provisional filing fee or cover sheet	
1053	130	1053	130	Non-English specification	
1812	2,520	1812	2,520	For filing a request for reexamination	
1804	920*	1804	920*	Requesting publication of SIR prior to Examiner action	
1805	1,840*	1805	1,840*	Requesting publication of SIR after Examiner action	
1251	120	2251	60	Extension for reply within first month	
1252	450	2252	225	Extension for reply within second month	
1253	1020	2253	510	Extension for reply within third month	
1254	1,590	2254	795	Extension for reply within fourth month	
1255	2,160	2255	1080	Extension for reply within fifth month	
1401	500	2401	250	Notice of Appeal	500.00
1402	500	2402	250	Filing a brief in support of an appeal	
1403	1000	2403	500	Request for oral hearing	
1452	500	2452	250	Petition to revive - unavoidable	
1453	1500	2453	750	Petition to revive - unintentional	
1462	400	1462	400	Petition fee under 37 CFR 1.17(f)	
1463	200	1463	200	Petition fee under 37 CFR 1.17(g)	
1464	130	1464	130	Petition fee under 37 CFR 1.17(h)	
1807	50	1807	50	Processing fee under 37 CFR 1.17 (q)	
1806	180	1806	180	Submission of Information Disclosure Stmt	
8021	40	8021	40	Recording each patent assignment per property (times number of properties)	
1809	790	2809	395	Filing a submission after final rejection (37 CFR § 1.129(a))	
1810	790	2810	395	For each additional invention to be examined (37 CFR § 1.129(b))	
1801	790	2801	395	Request for Continued Examination (RCE)	

Other fee (specify) \_\_\_\_\_

**\*Reduced by Basic Filing Fee Paid SUBTOTAL (3)**

(\$)500

**4. SEARCH/EXAMINATION FEES**

Fee Code	Fee (\$)	Fee Code	Fee (\$)	Fee Description
1111	500	2111	250	Utility Search Fee
1112	100	2112	50	Design Search Fee
1113	300	2113	150	Plant Search Fee
1114	500	2114	250	Reissue Search Fee
1311	200	2311	100	Utility Examination Fee
1312	130	2312	65	Design Examination Fee
1313	160	2313	80	Plant Examination Fee
1314	600	2314	300	Reissue Examination Fee

**SUBTOTAL (4)**

(\$)0

**Complete (if applicable)****SUBMITTED BY**

Name (Print/Type)

Michael L. Smith

Registration No.  
(Attorney/Agent)

35,685

Telephone

(314) 726-7500

Signature

Date

July 17, 2006

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EV 639016538 US



**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Application of: Mittelstein, et al.	)	Examiner: Emmanuel Sayoc
Serial No.: 10/673,296	)	Group No.: 3746
Filed: September 29, 2003	)	Docket No: P03115
Title: PERISTALTIC PUMP WITH MOVEABLE PUMP HEAD	)	(6639-000035/US)

**APPEAL BRIEF  
(37 C.F.R. § 41.37)**

Mail Stop Appeal Brief – Patents  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, Virginia 22313

Dear Sir:

By Notice of Appeal filed concurrently with this Appeal Brief, Applicant appeals the Final Rejection in the above-identified application dated 18 April 2006, and submit this Brief (in triplicate) in support thereof. It is believed that no extensions of time are required. Enclosed is a check in the amount of \$500.00 for fees under 37 C.F.R. § 41.20(b1) and (b2). If any other fees, including any extensions of time, are required, please charge Deposit Account No. 08-0750.

EV 639016538 US

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01 FC:1402

**I. REAL PARTY IN INTEREST**

The real party in interest in the present case is Bausch & Lomb Incorporated.

**II. RELATED APPEALS AND INTERFERENCES**

There are no other related Appeals or Interferences known to Appellant.

**III. STATUS OF CLAIMS**

Currently pending claims 1-4 stand rejected under 35 U.S.C. §102 (b). Claims 1, 2, and 4 have been amended and claim 3 was originally filed. All the claims are being appealed.

**IV. STATUS OF AMENDMENTS**

No amendment was filed subsequent to the final rejection.

**V. SUMMARY OF INVENTION**

The present invention relates to a peristaltic pump 10 for use in ophthalmic surgery wherein the pump head 14 is moveable relative to the housing 12 and the backing plate 18.

**VI. ISSUES**

The issue raised on this Appeal is whether Claims 1-4 have been improperly rejected under 35 U.S.C. §102 (b) as being anticipated by US Patent 4,713,051 to Steppe et al.

**VII. GROUPING OF CLAIMS**

Claims 1-4 are each an independent claim.

## VIII. ARGUMENTS

The case currently stands rejected under §102 as being anticipated by Steppe et al. It is respectfully submitted that Steppe et al. does not anticipate any of the four pending independent claims for at least the following reasons.

The Examiner asserts that Steppe teaches a pump with a pump head that is moveable relative to both a pump housing and a backing plate. This is simply not true. The pump head 82 is only moveable in the sense that it is mounted on a slidable plate 76 that is biased by a springs 78 and 79; otherwise pump head 82 is stationary.

As to independent claim 1 it is respectfully asserted that the head 82 of Steppe et al. is not moveable relative to both the housing and a backing plate, as specifically claimed. The pump head 82 of Steppe et al. will not move relative to opening 32, which is the only structure that could be argued to be a backing plate in the sense of the present invention. The pump head 82 will move as cassette 20 is inserted into unit 22 but will only move with the opening 32; therefore the head 82 will not move relative to the opening 32 but rather moves in unison with the opening 32. So head 82 always remains stationary relative to the opening 32. Therefore, Steppe et al. does not disclose the specifically claimed element of a pump head movable relative to the backing plate.

The Examiner, relative to claim 1, asserts that the pump head 82 of Steppe et al. moves towards opening 32. It is respectfully submitted that no such movement occurs. The spring biased plate 76 upon insertion of the cassette 20 only will move in the same direction as the cassette moves. The opening 32 moves, during insertion, relative to the head 82 but never does the head 82 move relative to the opening 32 as specifically claimed. In addition, the head 82 never moves towards the backing plate to an operative position as specifically claimed.

In addition, the Examiner asserts that the opening 32 is attached to the housing as specifically claimed. This is simply an unreasonably broad interpretation of attached. The opening 32 is part of cassette 20, which is a totally separate structure from unit 22 and is a removable device. To say that the

opening 32 is attached to the housing is simply not credible. The opening 32 is formed in cassette 20. The cassette 20 is then attached to the cassette mechanism (co. 9, lines 29-30). It is unclear to what the cassette mechanism is attached. Therefore, yet another limitation of claim 1 is not met by Steppe et al.

As to independent claim 2, the same arguments presented above apply. In addition, claim 2 requires that the pump head moves relative to the housing and towards and away from the backing plate. Since the plate 76 of Steppe et al. is only spring biased and not independently movable the head 82 cannot be said to move both towards and away from the opening 32. At best head 82 can only be said to move in one direction, with the movement of opening 32 as cassette 20 is inserted.

As to independent claim 3, the same arguments presented above apply. The opening 32 of Steppe et al. is not attached to the housing of the unit 22 and the pump head 82 does not move relative to the housing and a backing plate, as required by the claim.

As to independent claim 4, the same arguments presented above apply. In addition claim 4 includes a surgical cartridge (or cassette) that is separate from the backing plate. Claim 4 specifically sets forth that the backing plate is attached to the housing and the cartridge is placed in a drawer. This clearly distinguishes Steppe et al. as the opening 32 is part of the cartridge. Contrary to the Examiner's arguments claim 4 clearly sets forth a backing plate that is separate from the surgical cartridge.

Claim 4 further sets forth that the drawer is moveable from an open position to an operable position. Steppe et al. do not disclose a drawer but rather a slot 26. A slot is not a drawer that moves as claimed, but rather is simply a stationary hole into which cassette 20 is inserted. The Examiner asserts that the cassette bottom housing 28 and cassette edge 36 with slot 26 form a drawer. It is totally illogical to say that a thing to be inserted (the cassette 20, including bottom 28 and edge 36) can itself form the drawer. Things, e.g. cassettes or cartridges are placed into drawers or slots but are not themselves drawers or slots. Therefore, Steppe et al. is totally void of this claimed element.

Claim 4 still further claims that, after the drawer has moved to the operative position, the pump head moves toward the backing plate. Even if the cassette and slot in some stilted and illogical way could be said to be a drawer that moves, once the 'drawer' had moved in Steppe et al. the pump head 82 in no way moves as claimed in the present invention.

As the Federal Circuit has stated "anticipation requires the disclosure in a single prior art reference of each element of the claim under consideration". *W.L. Gore & Assocs. V Garlock, Inc.*, 721 F.2d 1540, 220 USPQ 303, 313 (Fed. Cir. 1993). The Examiner has wholly failed to show such anticipation. In view of the above arguments, it is clear that Steppe et al. does not anticipate any of the four independent claims and the present application is in condition for allowance at an early date.

## **IX. APPENDIX**

### **1. (Previously Amended) A peristaltic pump for use in ophthalmic surgery**

comprising:

a housing;

a pump head having a plurality of rollers held within the housing;

a backing plate attached to the housing;

resilient surgical tubing positioned between the pump head and the backing plate; and

wherein the pump head is moveable relative to the housing and the

backing plate, such that when the pump head is in an open position

the surgical tubing is easily inserted between the pump head and

the backing plate and wherein the pump head then translates

towards the backing plate to an operative position, such that as the

pump head is rotated the rollers and backing plate cooperate to

compress the tubing to peristaltically pump aspirant from a surgical site through the tubing.

**2. (Previously Amended)** A peristaltic pump for use in ophthalmic surgery comprising:

a housing;

a pump head having a plurality of rollers held within the housing;

a backing plate attached to the housing and for cooperation with the pump head; and

wherein the pump head moves relative to the housing and towards and away from the backing plate.

**3. (Original)** A peristaltic pump for use in ophthalmic surgery comprising:

a housing;

a pump head having a plurality of rollers extending from the housing;

a backing plate attached to the housing and for cooperation with the pump head; and

wherein the pump head moves relative to the housing and backing plate from an open position to an operative position for insertion of resilient surgical tubing between the rollers and the backing plate for peristaltically pumping aspirant through the tubing from a patient's eye during surgery.



**4. (Previously Amended)**      A peristaltic pump for use in ophthalmic surgery

comprising:

a housing;

a pump head having a plurality of rollers held within the housing;

a backing plate attached to the housing and for cooperation with the

pump head;

a surgical cartridge including a length of resilient tubing connected to a collection

bag and for connection to a surgical aspiration device via additional

tubing; [and]

a cartridge holder drawer for holding the surgical cartridge and

moveable from an open position to an operative position; and

wherein the pump head moves relative to the housing, such that after

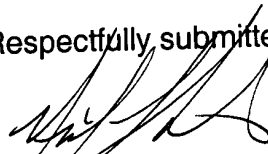
the drawer moves from the open position to the operative position, the

pump head is moved toward the backing plate, such that the rollers and

the backing plate cooperate to peristaltically pump aspirant through the

length of tubing as the pump head is rotated.

Respectfully submitted,



Michael L. Smith  
Reg. No. 35,685

DATE: July 17, 2006  
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Rochester, New York 14604-2701  
TEL: 636-226-3197